

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 50 OF 2004

Vincent Fernandes,  
Central Jail,  
Aguada, Goa.

..... Appellant

*V e r s u s*

STATE  
(Through Public Prosecutor,  
Panaji, Goa.)

..... Respondent

Ms. A. Dessai, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent.

CORAM:     N. A. BRITTO, J.

DATE:       3<sup>rd</sup> August, 2006.

ORAL JUDGMENT

This appeal is by an accused who has been convicted and sentenced under Section 376 I.P.C. to undergo R.I. for a period of seven years and to pay a fine of Rs.5,000/- in default to undergo S.I. for one year.

2. The accused was charged and tried with the allegation that on 31.03.1999, at about 9.30 hours, at Vanxem, Loutolim, the accused committed rape on victim/P.w.3, daughter of Joao Roque Fernandes and Ana Maria Fernandes (P.w.1 and P.w.12 respectively), aged 14 years.

3. The victim/P.w.3, was little over 14 years of age as on the date of incident. She was a student of Std. IX studying in the Saviour of the World High School at Loutolim. On 31.03.1999 she went to Church to attend 8 O'Clock mass and whilst returning, she met the accused, her acquaintance for about two years and friend of her brother Joaquim/P.w.13 and who had earlier on 22.03.1999, borrowed an English audio cassette from him. According to the victim/P.w.3, the accused made fun of her and told her about the said cassette having been given by her brother and she in turn told the accused to bring the said cassette and she returned home. The accused at about 9.30 went to the house of victim/P.w.3, where she was alone with the pretext of returning the said cassette. The accused has admitted, when he was examined under Section 313 of the Code of Criminal Procedure, 1973, that he did go to the house of P.w.3 to return the said cassette but according to him, when he went to the house of victim/P.w.3, he entered the said house by the rear door and handed over

the said cassette to the victim/P.w.3, but he did not molest or rape her. According to victim/P.w.3, the accused entered her house by the rear door, where there was a wooden box in the room next to the kitchen, where the victim/P.w.3, sat on the box and then the accused lifted her and took her to the other room and made her sleep on the bench in that room, pressed her breasts and forcibly removed her knicker and then opened the pant zip and then slept over her and then put his penis into her private part and got up after about two minutes and then went away. According to her, she started bleeding from her private part and she washed the said blood and cleaned everything and as she was to go to the post office at Loutolim to collect her sister's money, she started going there but could not proceed as she started bleeding again from her private part and then she started feeling giddy and therefore she started to return to her house when she met her neighbour Umelina/P.w.5, who asked her as to what had happened and she told her that the accused had forcible intercourse with her at her house, and Umelina/P.w.5 called her sister Filomena/P.w.6 and the latter gave her a piece of cloth to put on her private part, as she was bleeding and she was given lime soda to drink and was made to lie down on the bed and then Doctor (Mrs. Corina/P.w.14) was called, who examined her and advised that she be taken to Hospicio Hospital. The victim/P.w.3, was first taken to

Borkar Nursing Home at Margao, where she was treated by the Gynaecologist. Dr. Shilpa Gude/P.w.15, has confirmed that the victim/P.w.3, was brought to the said hospital and at the time she was brought, there was no bleeding but she was kept under observation. The victim/P.w.3, did not remember having been taken to Dr. Borkar Nursing Home but, according to her, she was taken to Hospicio Hospital, at Margao. According to Dr. Gude/P.w.15, the victim/P.w.3 revealed at night time that the bleeding bout was due to an act of forced sexual intercourse and therefore the victim/P.w.3, was referred to the Government Hospital for further medical treatment. The victim/P.w.3, has confirmed this by stating that she was taken to Hospicio Hospital, Margao, where she was examined and was discharged on the same day and the Doctor at Hospicio Hospital, Margao, told them that they should lodge a complaint, which was in fact lodged by Natalina/P.w.2, at about 01.30 hours of 01.04.1999.

4. Meanwhile, the father of the victim, namely, Joao Roque Fernandes/P.w.1, along with Rinaldo/P.w.11, Thomas/P.w.7 and some others, proceeded in search of the accused in a Maruti van driven by the latter and they met the accused at about 9.00 p.m., on the road near his house and the accused was brought to Margao at Dr. Borkar's Nursing

Home and from there, the accused was taken to Hospicio Hospital, presumably along with the victim/P.w.3 and from there to the Police Station where the accused was handed over to the police.

5. The prosecution had examined 17 witnesses to support the case and a brief reference to the evidence of some of the said witnesses is required to be made. The first person the victim/P.w.3 met after the incident, was Umelina/P.w.5, who had taken her own son to the Health Centre at Loutolim and was returning therefrom. According to Umelina/P.w.5, she met the victim/P.w.3 and saw that her dress was stained with blood and blood was also flowing from her legs and therefore she asked her as to what had happened but the victim/P.w.3, did not reply to her question and started walking quietly. Umelina/P.w.5 followed the victim and then took one piece of cloth from her house and gave it to her to put on her private part to stop the overflow of blood and then she called her sister in law Filomena/P.w.6 and as the blood flow was not stopping, Thomas, the husband of Filomena/P.w.6 called Dr. Corina/P.w.14, who advised them to take the victim/P.w.3, to the hospital. Umelina/P.w.5 stated that when she questioned the victim/P.w.3, about the reason of her bleeding, she told her that Vincent Fernandes had forcible sexual

intercourse with her. In cross examination she stated that when she had met victim/P.w.3 and had asked her as to where she was going, the victim/P.w.3 had told her that she was going to the post office but due to flow of blood from her private part, she was returning to her house and at that time, the victim/P.w.3, had postal book in her hands. Umelina/P.w.5 also stated in further cross examination that when she had asked the reason for the flow of blood, the victim had got nervous and fearful and had not answered. Filomena/P.w.6 was the next witness to reach the scene, being informed by Umelina/P.w.5. Filomena/P.w.6 confirmed what Umelina/P.w.5 stated. According to Filomena/P.w.6, her sister in law Umelina/P.w.5 told her that the victim was full of blood and told her to come to her house and when she went there, she noticed that blood was pouring down the legs of the victim/P.w.3, and then she called her husband Thomas/P.w.7 to call for a Doctor and who came with Dr. Corina/P.w.14 and at that time, the victim had told her that the accused had forcible sexual intercourse with her and therefore she was taken to the hospital in a Maruti van of Rumaldo/P.w.11. The next witness to reach the scene, presumably was Natalina/P.w.2, who stated that she returned home at about 12.00 noon for lunch and at that time she heard the victim/P.w.3 crying, as the house of the victim is close to her house and when she went

there, she found that Umelina/P.w.5 and Filomena/P.w.6 were present and she asked the victim/P.w.3, as to what had happened and the victim replied stating that Vincy had raped her and she also saw that the victim was bleeding. She has confirmed about bringing of Dr. Corina/P.w.14, who told them that she could not do anything and that the victim/P.w.3, should be taken to the hospital and that it also appeared to her that the victim/P.w.3, was raped but she was unable to verify the same. Natalina/P.w.2 has confirmed about the lodging of the complaint.

6. The other witnesses who reached the scene are Joao Roque/P.w.1, the father of the victim, Ana Maria/P.w.12, the mother of the victim, Rosa Maria/P.w.4, the sister of the victim and Joaquim/P.w.13, the brother of the victim. A brief reference to the evidence of the said sister and the brother could not be out of context. Rosa Maria/P.w.4, has stated that she was at her work place at the house of one Augusto Monteiro, where she received a message sent by Umelina/P.w.5 that she should come home and when she returned home, she found that her sister, the victim/P.w.3, was on bed, bleeding from the vagina and she learnt that the victim was raped by the accused. She has also stated that the underwear, the shirt and a piece of cloth soaked with blood, were kept by the victim in the bathroom

along with another item and she took all the four items at the rear side of the house and set fire to them which got partly burnt. That is how, she identified M.O.1, M.O.2, M.O.3 and M.O.4 as partly burnt clothes which were subsequently attached under panchanama on 01.04.1999 in the presence of Cajetan D'Silva/P.w.10. Joaquim/P.w.13, has confirmed that he had given an audio cassette of English Smash Hits to the accused on 22.03.1999. He has confirmed that the accused was a pick up driver and was his friend but he has stated that he had not told the accused to come to his house to return the cassette and that the accused had also not told him that he would be coming to his house and the accused had never been to his house prior to the dates of the incident. According to him, on 31.03.1999, at about 6.30 a.m., he had gone to ITI at Farmagudi, and when he returned at about 11.00 a.m., he came to know that the accused had sexual intercourse with his sister.

7. After the incident, as already noted, Joao Roque/P.w.1, Thomas/P.w.7 and Rumaldo/P.w.11, went in search of the accused. According to Joao Roque/P.w.1, when he returned home at about 11.30 a.m. on 31.03.1999, he found that there were many persons present in his house including Umelina/P.w.5, Filomena/P.w.6, Natalina/P.w.2,

Thomas/P.w.7 and some others and the said Thomas told him that his daughter was bleeding and that Dr. Corina/P.w.14, was brought to the house. Joao Roque/P.w.1 also stated that thereafter he along with Thomas, Francis, Manuel, Pedro and others, went to the house of the accused but the accused was not in the house, where they met the mother and sister of the accused and when they inquired about the accused, they were told that the accused had gone out and they met the accused on the road at Angalli and at that time, Francis asked the accused whether the accused had raped his daughter when the accused admitted having had sexual intercourse with his daughter and then they brought the accused to Hospicio Hospital. Rumaldo/P.w.11 has corroborated the version of Joao Roque/P.w.1, having gone in search of accused. According to Rumaldo/P.w.11, they had met the accused on the road and they brought him in the same van first to Dr. Borkar's Nursing Home and thereafter he was taken to Hospicio Hospital and from there, to the Police Station. According to Rumaldo/P.w.11, the accused being told to sit in the van, the accused sat in the van immediately when he was told that he should accompany them to the hospital. The admission by the accused of having sexual intercourse with the victim/P.w.3 has been confirmed by Thomas/P.w.7, who also stated that they had met the accused on the way and when they had questioned the accused as to

whether he had sexual intercourse with the victim, the accused had admitted it and then they had taken the accused in their car and brought him to Margao Police Station and handed him over to the police.

8. The accused was sent for medical examination and was examined by Dr. Sapeco/P.w.8 while the victim/P.w.3, was examined by Dr. Jimmy Paul. According to Dr. Sapeco/P.w.8, the accused had redness at the frenulum and glans penis, which was seen at retraction of prepuce and as per the history given to him by the accused, the accused was involved in sexual intercourse at around 9.20 a.m. with the victim. According to Dr. Sapeco, the physical genital examination of the accused was suggestive of recent forcible sexual intercourse. The medical report of Dr. Jimmy Paul showed that the victim's hymen was absent, labia minora was bruised and bled on touch. The opinion given by Dr. Jimmy Paul is that the physical genital examination of the victim was suggestive of recent sexual intercourse.

9. The learned Additional Sessions Judge, after considering the evidence of the prosecution, came to the conclusion that the evidence clearly indicated that Joaquim/P.w.13, the brother of the victim/P.w.3, had

given one audio cassette to the accused on 22.03.1999 and on 31.03.1999, the accused told the victim that he wanted to return the said cassette and went to her house with the said cassette which fact was admitted by the accused under Section 313 of Cr. P.C. According to the learned Additional Sessions Judge, the evidence of the victim did not suffer from any infirmity and clearly indicated that after entering the house, the accused latched the door and thereafter had sexual intercourse with her as a result she had started bleeding through her vagina and her testimony was amply corroborated by Umelina/P.w.5, Filomena/P.w.6, Thomas/P.w.7 and Dr. Corina/P.w.14. The learned Additional Sessions Judge further held that the medical reports also corroborated the case of the prosecution. The learned Additional Sessions Judge also referred to the evidence of Joao Roque/P.w.1 and Thomas/P.w.7 and held that their evidence was corroborative and clearly indicated that when they had questioned the accused about the incident, the accused had admitted having had sexual intercourse with the victim/P.w.3, and which was a material corroborative piece of evidence. The learned Additional Sessions Judge found that there was ample evidence on record to prove that the accused had sexual intercourse with the victim/P.w.3, who was a minor on the date of the incident.

10. Ms. A. Dessai, the learned Counsel on behalf of the accused has submitted that as per the victim/P.w.3, there were two houses in the close neighbourhood and if the victim/P.w.3, had at all cried, her immediate neighbours would have heard her cry and would have come to her rescue. Learned Advocate further submits that nobody saw the accused on that day in the locality of the house of the victim and this shows that the accused was falsely implicated. Learned Advocate further submits that the accused is not the author of the crime committed against the victim/P.w.3. It is further submitted by learned Counsel on behalf of the accused that there is no corroboration by way of medical evidence in that no semen was found either on the clothes of the victim/P.w.3, or those of the accused.

On the other hand, Ms. Coutinho, the learned Public Prosecutor has submitted that there is no reason good enough not to believe the version given by the victim/P.w.3. Learned Public Prosecutor submits that there is contemporaneous evidence of Umelina/P.w.5 and Filomena/P.w.6 which support the version of the victim/P.w.3 and there is absolutely no reason as to why the victim or for that matter the said Umelina/P.w.5 or Filomena/P.w.6 should falsely implicate the accused. Learned Public

Prosecutor has placed reliance on the case of *Ishwar vState of Maharashtra (2005 ALL MR (Cri) 720)*, wherein this Court held that, where there was no evidence to show that the accused had discharged semen in her vagina, when the accused had had sexual intercourse with her and, in the absence of semen and blood in the vaginal swab or on the clothes of the accused and the prosecutrix, it could not be concluded that no rape was committed on her.

11. In my view, this is a case where the prosecution can safely claim that there is corroboration to the version of the victim/P.w.3 at every step. Firstly, it has been sufficiently explained both by the victim/P.w.3 and her brother Joaquim/P.w.13, how the accused on the pretext of returning the cassette borrowed by him from the victim's brother, came to the house, when the entire family was away on work. The absence of cries or shouts from the victim/P.w.3 is not relevant because the case is one of statutory rape. Moreover, the victim/P.w.3 has explained as to why she had to keep quiet. She has stated that the accused after entering her house from the rear door, latched the same, and she got scared and frightened that the accused would kill her and the accused had also told her that he would kill her in case she shouted and for that reason she kept quiet. On this aspect,

the learned Additional Sessions Judge had referred to the case of *State of Rajasthan v. N. K. ((2000) 5 S.C.C. 30)*, wherein it was held that when a victim of rape states on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, her testimony has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent. The accused has himself admitted that he had gone to return the cassette and therefore the question that the accused was not seen in the locality by any other person would not arise at all. The accused was the victim's brother's friend and also her acquaintance, as can be seen from the version given by the victim/P.w.3. The victim/P.w.3 also stated that the accused was also in the habit of making fun of her whenever he saw her. The medical evidence of Dr. Sapeco/P.w.8 as well as Dr. Jimmy Paul, clearly corroborates the version of the victim/P.w.3, that the accused had sexual intercourse with her. The clothes of the accused namely one long pant, one T-shirt and one knicker (Exhibit 2/M.O.5, exhibit 2(A)/M.O.6, exhibit 2(B)/M.O. 7), were attached in the presence of Cajetan D' Silva/P.w.10, having been handed over by the mother of the accused as the clothes of the accused and which clothes were subsequently identified by the victim/P.w.3, as clothes worn by the accused. The said clothes were sent to the C.F.S.L. at Hyderabad, and the knicker,

(Exhibit 2(B)/M.O.7), was found with human blood and the accused offered no explanation as to how his knicker came to have human blood and the only inference is that the said blood was none other than of the victim/P.w.3, who bled profusely by forced sexual intercourse by the accused. This is another incriminating circumstance against the accused.

12. The evidence of the victim/P.w.3, to a great extent, is duly corroborated by the evidence of Umelina/P.w.5, Filomena/P.w.6 as well as Natalina/P.w.2, to whom the victim/P.w.3 confided that the bleeding was due to forced sexual intercourse by the accused. Moreover, there was admission by the accused that he had sexual intercourse with the victim/P.w.3, made before the father of the victim Joao Roque/P.w.1 and Thomas/P.w.7, when they went in search of the accused and the accused without any hesitation volunteered to accompany them. As regards the injury on the penis of the accused, the accused admitted before Dr. Sapeco/P.w.8, that he had sexual intercourse with the victim/P.w.3. All this evidence can point out to only in one direction that it is the accused and accused alone who committed forceful sexual intercourse upon the victim/P.w.3, who had just completed the age of 14 years on the date of the incident. As regards the absence of semen either on the clothes of the

victim/P.w.3 and the accused is concerned, it must be stated that rape is all regards penetration i.e. penile vaginal penetration and certainly not about ejaculation or emission of semen as the very explanation under Section 375 I.P.C. shows. The Apex Court in the case of ***Prithi Chand v. State of Himachal Pradesh (1989 S.C. 702)*** observed that mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case. Therefore, in the absence of semen being found either on the clothes of the accused or the victim, the entire case of the prosecution which is otherwise well corroborated at every stage, cannot be thrown overboard. The Apex Court in the case of ***State of Tamil Nadu v. Ravi @ Nehru (2006 AIR SCW 3444)***, has referred to Modi's Medical Jurisprudence, Parikh's Textbook of Medical Jurisprudence as well as Encyclopedia of Crime and Justice. Referring to the case of ***Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204***, where the accused was charged with the rape of a minor girl of eight years, the Supreme Court noted as what that Court had held that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape. In Paras 14, 15 and 16, the Apex Court observed thus:

“14. We may also notice the opinion expressed

by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

“Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating

the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.”

15. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

“Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.”

16. In Encyclopedia of Crime and Justice (Vol.4) at page 1356, it is stated:

“..... even slight penetration is sufficient and emission is unnecessary.”

13. Thereafter, the Supreme Court proceeded to observe that it is now well accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is also well accepted principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. The woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. The Apex Court also referred to the case of *Ranjit Hazarika v. State of Assam (1998) 8 SCC 635* and observed that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix and again referring to the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (AIR 1983 SC 753)*, noted that the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offender is entitled to great weight, absence of corroboration notwithstanding.

14. As already stated, the version of the victim/P.w.3, was more than sufficiently corroborated and there was other circumstantial evidence as well, which supported her version. It is difficult to believe that the victim/P.w.3, would falsely implicate her brother's friend and her own acquaintance to save somebody else. Considering the overwhelming evidence produced by the prosecution, the conviction of the accused cannot be faulted.

15. As regards the sentence, it has been submitted by the learned Advocate of the accused that the accused was of young age and was a first offender and, therefore, the sentence of seven years imposed by the learned Additional Sessions Judge, be reduced. On the other hand, it has been submitted on behalf of the prosecution that in another case reported in **2001(2) G.L.T. 237 (Santan Fernandes v. State)**, this Court was pleased to enhance the sentence from seven years to ten years. However, it has been explained on behalf of the accused, that the case of **Santan Fernandes** (supra), was a case where the victim was four years old and was awarded the said sentence based on a Judgment of the Apex Court in the case of **State of Karnataka v. Krishnappa (AIR 2000 SC 1470)**, wherein the Apex Court had observed thus:

“The normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years R.I. in exceptional cases “for special and adequate reasons” sentence of less than 10 years R.I. can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The Courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for “special and adequate reasons and not in a casual manner. Whether there exist any special and adequate reasons” would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application.”

16. The victim/P.w.3, was born on 02.03.1985 and she had completed 14 years and 28 days as on the date of the incident. The accused has been awarded the minimum sentence of seven years as provided by Section 376. The proviso below sub-section (1) of Section 376 states that

the Court may impose a sentence of imprisonment for a term of less than seven years for adequate and special reasons. Considering the facts of the case, I do not think there are any adequate or special reasons to reduce the sentence further, then the minimum awarded by the learned Additional Sessions Judge, even if one is to consider that the accused at the relevant time was about 25 years of age. In the circumstances therefore, I do not propose to interfere with the sentence imposed upon the accused, as well.

17. In view of the above, I find there is no merit in the appeal and consequently the same is hereby dismissed.

18. The name of the victim is not mentioned in view of the Judgment of the Supreme Court reported in **2006 AIR SCW 2814**.

N. A. BRITTO, J.

arp/\*